

State of California
Department of Industrial Relations
DIVISION OF WORKERS' COMPENSATION
455 Golden Gate Avenue, 9th Floor
San Francisco, CA 94102

NOTICE OF EMERGENCY REGULATORY ADOPTION

Finding of Emergency and Informative Digest

Subject Matter of Regulations: Workers' Compensation –Spinal Surgery Second Opinions

The Administrative Director of the Division of Workers' Compensation, pursuant to the authority vested in him by Labor Code Sections, 133, 4062, and 5307.3, proposes to adopt Article 5.1 of Chapter 4.5, Subchapter 1, of Title 8, California Code of Regulations, commencing with Section 9788. This action is necessary in order to implement, on an emergency basis, the provisions of Labor Code Section 4062, as amended by Senate Bill 228 (Chapter 639, Stats. of 2003, effective January 1, 2004).

Finding of Emergency

The Administrative Director of the Division of Workers' Compensation finds that the proposed regulations attached hereto are necessary for the immediate preservation of the public peace, health and safety or general welfare.

Statement of Emergency

The Legislature amended Labor Code Section 4062 in Senate Bill 228 (Chapter 639, Statutes of 2003, effective January 1, 2004) to institute a new evaluation procedure when a treating physician recommends spinal surgery as treatment and an employer objects. The amended statute is designed to provide an expeditious procedure for determining whether recommended spinal surgery should be provided. The statute provides for a second medical opinion to decide the issue. It provides that the opinions shall be rendered within 45 days of the physician's recommendation.

The statute is not self-executing; it does not define "spinal surgery," nor does it outline how physicians will be selected to be on a list from which the Administrative Director shall randomly select the physicians. It does not provide any details as to what is to be covered by the report of the second opinion physician, whether the physician is to examine the employee, or how the physician is to be paid for the opinion. The Administrative Director needs to adopt regulations to implement this section of the Labor Code. There are many requests pending for assignment of second opinion physicians.

The Administrative Director has therefore determined that the emergency adoption of the proposed regulations is necessary for the immediate preservation of the public peace, health and

safety or general welfare.

Authority and Reference

The Administrative Director is undertaking this regulatory action pursuant to the authority vested in the Administrative Director by Labor Code Sections 133, 4062, and 5307.3, and Government Code sections 11400.20 and 11415.10.

Reference is to Labor Code Section 4062.

Informative Digest

These regulations are required by a legislative enactment - Statutes of 2003, Chapter 639.

Section 4062 of the Labor Code, as amended by Senate Bill 228, requires that, effective January 1, 2004, where an employer disagrees with the recommendation of a treating physician for spinal surgery, the employer is to obtain a second opinion from a qualified physician selected at random by the Administrative Director.

The Administrative Director now proposes to adopt regulations governing the selection of spinal surgery second opinion physicians, their reports, and their compensation. These proposed regulations implement, interpret, and make specific Section 4062 of the Labor Code as follows:

Chapter 5.1 Spinal Surgery Second Opinions

1. Section 9788.01 Definitions.

This section provides definitions for key terms relating to spinal surgery second opinions provided for by amended Labor Code §4062. The key terms include:

(a) Agreed second opinion physician is defined as a physician agreed upon by an employer and represented employee pursuant to Labor Code Section 4062 subdivision (b).

(b) Completion of the second opinion process is defined as occurring on the forty-fifth day after the receipt of the treating physician's report by the employer, unless the time has been extended by mutual written consent of the parties, or unless the time has been extended because the employee failed to attend an examination with the second opinion physician or agreed second opinion physician.

(c) "CPT®" is defined to identify the licensed procedure coding system created by the American Medical Association and utilized in the Official Medical Fee Schedule.

(d) Income of a person is defined to include the income of that person's business partner, physician member of the office of a group practice as defined in Labor Code section 139.3,

spouse, cohabitant, and immediate family. Income of a second opinion physician does not include income from employment which had terminated prior to the time the physician was selected as a second opinion physician where there is no reasonable prospect of future employment.

(e) Material familial affiliation is defined as a relationship in which one of the persons or entities listed in subdivision (c) of Labor Code section 4062 is the parent, child, grandparent, grandchild, sibling, uncle, aunt, nephew, niece, spouse, or cohabitant of the second opinion physician. For entities of the employer, insurer, physician, medical group, independent practice association, administrator, utilization review entity, facility, or institution mentioned in subdivision (c) of Labor Code section 4062, which are not persons, the familial affiliation is to be determined by considering the relationship to the second opinion physician of all of the officers, directors, owners and management employees, and individual claims administrators and supervisors.

(f) Material financial affiliation is defined to include all of the following financial relationships between the second opinion physician and another person or entity listed in subdivision (c) of Labor Code section 4062, or parent or subsidiary or otherwise related business entity of a person or entity:

- (1) Where one has a direct or indirect investment worth \$2,000 or more in the other;
- (2) Where one is a director, officer, partner, trustee, employee, or holds any position of management in the other;
- (3) Where one has a direct or indirect interest worth two thousand dollars or more in fair market value in an interest in real estate owned or controlled by the other;
- (4) Where one has received income of any kind, including gifts, from the other, aggregating three hundred dollars or more within the twelve months prior to the time of selection as a second opinion physician. For purposes of this subdivision, the following income is not counted:
 - A. income for services as a second opinion physician;
 - B. income for services as a treating physician;
 - C. income for services as an agreed medical examiner;
 - D. income for services as a panel Qualified Medical Evaluator selected for unrepresented employees;
 - E. income from services as a Qualified Medical Evaluator for represented employees.
 - F. income for services as a Qualified Medical Evaluator for an employer from the first five cases in any twelve month period for the same employer, carrier, or administrator.

- (5) Where one has an employment or promise of employment relationship with the other.

(g) Material professional affiliation is defined as any relationship in which the second opinion physician shares office space with, or works in the same office of, any of the other persons or entities listed in subdivision (c) of Labor Code section 4062.

(h) Parent, subsidiary, and otherwise related business entity are defined to have the same meanings as they have in Section 18703.1, Title 2, Division 6 of the California Code of Regulations.

(i) Receipt of the treating physician's report is defined to be the day it was first received by the employer, insurance carrier, or administrator.

(j) Retired spinal surgeon is defined to be a physician currently licensed in the State of California who once had, but no longer has, hospital privileges to perform spinal surgery described in Section 9788.2 (c)(2). "Retired spinal surgeon" does not include a physician whose hospital privileges to perform spinal surgery were either surrendered by the physician or were terminated or not renewed by the hospital, after disciplinary charges were filed or after a disciplinary investigation was commenced.

(k) Second opinion physician is defined as the physician who is randomly selected pursuant to subdivision (b) of Labor Code section 4062 to render the second opinion on a treating physician's recommendation of spinal surgery.

(l) Spinal surgery is defined to include procedures described in enumerated procedural codes for procedures listed in the Official Medical Fee Schedule, any other procedure, which is not listed in subdivision(c)(1), which is a non-diagnostic invasive procedure to the spine or associated anatomical features to perform an operative or curative procedure which is not primarily an analgesic procedure, and any procedure that involves the introduction of energy or a foreign substance that destroys tissue in the spine and/or associated structures, including nerves and disks, or involves the implantation of devices into the spine and associated structures, including nerves and disks, and which is not primarily an analgesic procedure.

Subdivision (4) of this definition excludes from the definition of spinal surgery procedures which include penetration of the body by needles in the performance of acupuncture by a practitioner whose license permits the performance of acupuncture. The definition also excludes surgery which is required because of a bona fide medical emergency.

2. Section 9788.1 Employer's Objection To Report Of Treating Physician Recommending Spinal Surgery.

This subdivision provides for the service of an employer's objection to the treating physician's recommendation for spinal surgery, and what the objection shall contain. The objection is to contain the employer's specific reasons for the objection, and a copy of the treating physician's recommendation objected to. It provides that the objection is to be served by mail or other rapid means of delivery, such as fax or overnight delivery. It provides that service is to be made on the Administrative Director, the employee, the employee's attorney, if any, and on the treating physician. It provides that the objection is to be served within 10 days of receipt of the treating physician's recommendation.

It provides that the employer's objection is to include a declaration made under penalty of perjury. The declaration is to state when it was made, the date the objection was sent, and the date the treating physician's recommendation was first received by the employer, insurance carrier or administrator. The declaration and form are to be executed by a principal or employee of the employer, carrier, or administrator. The section provides that the employer shall notify the Administrative Director if the employer and employee agree to an agreed second opinion physician, or if the employer withdraws the objection. The notification is to be made within one working day of the agreement or withdrawal of the objection.

3. Section 9788.11 Objection form

This section prescribes an objection form to request the opinion of a second opinion physician.

4. Section 9788.2 Qualifications of Spinal Surgery Second Opinion Physicians

This section sets forth the qualifications of physicians who can become agreed second opinion physicians and second opinion physicians.

(a) This subdivision provides that an agreed second opinion physician may be any California licensed board-certified or board-eligible orthopaedic surgeon or neurosurgeon.

(b) This subdivision provides for the Administrative Director to maintain a list of qualified surgeons who have applied, and whom the Administrative Director has found to be eligible to give second opinions under Labor Code § 4062 (b).

(c) This subdivision provides for the qualifications for a physician to apply to be on the Administrative Director's list of second opinion physicians. The applicants are to demonstrate to the satisfaction of the Administrative Director that the physician:

- (1) Is currently board certified as a neurological surgeon or orthopaedic surgeon;
- (2) Has current unrestricted hospital privileges at an accredited hospital in the United States to perform spinal surgery without proctoring;
- (3) Has an unrestricted license as a physician and surgeon in California;
- (4) Has no record of previous discipline by any governmental physician licensing agency, and is not under accusation by any physician licensing agency.
- (5) Has not been terminated or disciplined by the Industrial Medical Council or Administrative Director in relation to the role of Qualified Medical Evaluator; is not then under accusation by the Industrial Medical Council or Administrative Director; has not been denied renewal of Qualified Medical Evaluator status except for non-payment of fees or non-completion of continuing education; has not filed forms or applications with the Industrial Medical Council or Administrative Director containing false material statements; and
- (6) Has not been convicted of any crime of dishonesty or any crime of moral turpitude.

(d) This subdivision provides that the Administrative Director may also accept to be on the list a physician who does not currently have unrestricted hospital privileges, if the physician had

spinal surgery hospital privileges within the last three years. The section utilizes the definition "retired spinal surgeon." The qualification of such physician shall not extend longer than three years from the last time the physician did have unrestricted hospital privileges.

(e) This subdivision provides that the Administrative Director may also accept to be on the list a physician who has a record of previous discipline, if at least five years have elapsed since discipline was imposed, the physician is not currently under discipline accusation, and the Administrative Director finds that the physician has been rehabilitated.

5. Section 9788.3 Application Procedure

This section sets forth the application procedure for a physician to be on the list of second opinion physicians. It provides that the physician is to apply to the Administrative Director on a form prescribed by the Administrative Director, and that the physician is to submit certified copies of board certification, fellowship, and hospital privileges, as well as other documentation which the Administrative Director may require. The physician is to keep the Administrative Director informed of changes in address and telephone and fax numbers.

6. Section 9788.31 Application Form

This section prescribes an application form for second opinion physicians.

7. Section 9788.32 Administrative Director's Action on Application.

This section prescribes how the Administrative Director is to treat applications. It provides for notice to successful applicants by mail. If the Administrative Director finally determines that an applicant physician is not qualified, the Administrative Director is to notify the applicant that the application is rejected. An applicant whose application has been rejected may request a hearing within 30 days of the mailing of the rejection. If the Administrative Director does not receive a request for hearing within 30 days, the applicant is deemed to have waived any hearing on the rejection. Upon receipt of a request for a hearing, the Administrative Director is to serve a statement of issues. Any hearings are to be held under the provisions of Government Code section 11500 *et seq.* Failure to file a notice of defense or to attend a hearing waives the right to a hearing. Rejected applicants may reapply after one year, or after correcting deficiencies in their application, whichever occurs first.

If an otherwise qualified applicant does not qualify because of a record of previous discipline more than five years old, the Administrative Director is to notify the applicant that the applicant can submit written evidence of rehabilitation. The Administrative Director is to consider the applicant's evidence of rehabilitation plus any evidence the Administrative Director may have by way of investigation, and determine whether the applicant has been rehabilitated. If the Administrative Director finds the applicant has not been rehabilitated, the application is rejected.

8. Section 9788.4 Removal of Physicians from the Spinal Surgery Second Opinion Physician List.

This section sets forth the reasons for which the Administrative Director may remove a second opinion physician from the list. The physician can be removed if:

- (a) the physician no longer meets the qualifications to be on the list; or
- (b) any state medical board from whom the physician is licensed has filed any accusation against the physician; or
- (c) the physician has not served the second opinion report in a case within the time limits; or
- (d) the physician's application to be on the list contained untrue statements; or
- (e) the physician failed to disclose that the physician had a material professional, familial, or financial affiliation with any of the persons or entities listed in subdivision (c) of Labor Code section 4062 in any case.

An physician who has been removed from the list may petition for reinstatement after one year has elapsed since the date of the physician's removal.

9. Section 9788.5 Random Selection of Second Opinion Physician.

This section provides for the process of selecting a second opinion physician.

(a) This subdivision provides that the Administrative Director is to make the random selection within 5 days of receipt of an objection to a treating physician's recommendation. The random selection is to be made from those physicians on the list who are within a 30 mile radius of the employee. If there are less than 6 second opinion physicians within the 30 mile radius, the Administrative Director is to use increasing radii, until an area is achieved in which there are 6 physicians to choose from. The selected physician is to notify the Administrative Director within five working days if he has a material professional, familial, or financial affiliation with any of the persons or entities listed in subdivision (c) of Labor Code section 4062. In the case of such a notification, the Administrative Director is to select a replacement physician.

(b) This subdivision provides that until the Administrative Director has a computerized system for selecting second opinion physicians, they shall be manually selected, using the zipcode of the employee's residence, and increasing contiguous zipcode areas, until an area is achieved which will have at least six physicians from which to select.

(c) This subdivision provides that the physician shall notify the parties of the date and time of the appointment within five working days.

(d) This subdivision provides that the employee has ten days in which to object to the selection on the basis that the second opinion physician has a prohibited material professional, familial, or financial affiliation. Labor Code section 4062 provides that the physician is prohibited from having such affiliations, leaving it to the Administrative Director to determine what they are. The objection must be filed in writing with the Administrative Director. The Administrative Director may either sustain the objection, in which case a new selection shall be made, or deny the objection.

10. Section 9788.6 Examination by Second Opinion Physician or Agreed Second Opinion Physician.

(a) This subdivision provides that the second opinion physician or agreed second opinion physician may physically examine the patient-employee, if the second opinion physician determines that an examination of the patient-employee is required. The physician must physically examine the patient-employee before rendering the opinion in all cases in which the physician disagrees with the recommendation of the treating physician. If there is to be a physical examination, the second opinion physician is to schedule the examination, and give ten days' written notice of the date, time, and place of the examination.

(b) This subdivision provides for what information may be given to the second opinion physician, and how contact may be made. The employer must furnish medical information to the physician. The employee has the option to do so. The records which are to be provided are: all relevant medical records including x-ray, MRI, CT, and other diagnostic films, and any medical reports which describe the employee's current spinal condition or contain a recommendation for treatment of the employee's spinal diagnoses. The subdivision also provides that the notice for the examination shall be given with the same consideration of the employee's ability to attend as is required for other medical-legal examinations. The employer is required to furnish appropriate transportation to the employee. If a special form of transportation is required, the employer is obliged to furnish it. The employer is to furnish transportation expense in advance of the examination. The physician is not to have ex parte contact with any party outside the examination. All communications are to be in writing, with copies served on all parties.

(c) This section provides that if the employee fails to attend an examination with the physician, and the physician is unable to reschedule the employee's appointment before the 35th day after receipt of the treating physician's report, the time to complete the second opinion process will be extended for 45 days. If the physician is unable to schedule another examination within the 45 additional days, the Administrative Director will select another physician upon request.

11. Section 9788.7 Contents of second opinion and agreed second opinion physician reports:

(a) This subdivision provides that if the physician disagrees with the recommendation of the treating physician, the second opinion physician may include a recommendation for a different treatment or therapy in the report

(b) This subdivision provides what the second opinion physician's report is to contain. It is to include, where applicable:

- (1) The date of the examination;
- (2) The patient's complaints;
- (3) A listing of all information received from the parties reviewed in preparation of the report or relied upon for the formulation of the physician's opinion;
- (4) The patient's medical history relevant to the treatment determination;
- (5) Findings on record review or examination;

- (6) The relevant diagnosis;
- (7) The physician's opinion whether the proposed spinal surgery is appropriate or is not indicated, and any alternate treatment recommendations;
- (8) The reasons for the opinion;
- (9) The signature of the physician.

(c) This subdivision provides that the physician is to include with service of the report, a declaration under penalty of perjury that the physician had no material familial affiliation, material financial affiliation, or material professional affiliation prohibited by Labor Code Section 4062, subdivision (c).

12. Section 9788.8 Time limits for providing reports:

This section provides for the time and manner of service of the physician's report. The physician is to serve the report on the employer, the employee, and the employee's attorney, if any. Service of the report is to be as soon as possible, but in any event within forty-five days of receipt of the treating physicians report, unless the parties have agreed in writing to extend the time to a later date.

13. Section 9788.9 Charges for Services of Second Opinion Physician and Agreed Second Opinion Physician.

This section establishes the fees that can be charged for a second opinion physician report. The employer is to pay for the physician's services. If there is no physical examination, the fee is set at one half of the fee allowed under Section 9795 for a Basic Comprehensive Medical-Legal Evaluation, without modifiers which might otherwise be allowed under Section 9795(d). If the physician examines the injured worker, the fee is the same as the fee allowed under Section 9795 for a Basic Comprehensive Medical-Legal Evaluation, without modifiers which might otherwise be allowed under Section 9795(d).

14. Section 9788.91 Filing of a Declaration of Readiness to Proceed

Labor Code Section 4062 provides that the employer shall file a declaration of readiness to proceed, if the report of the physician does not concur with the treating physician's recommendation for surgery. This section is not applicable if the parties agree with the determination of the second opinion physician.

MATTERS PRESCRIBED BY STATUTE APPLICABLE TO THE AGENCY OR TO ANY SPECIFIC REGULATION OR CLASS OF REGULATIONS

There are no other matters prescribed by statute applicable to the Division of Workers' Compensation or to any specific regulation or class of regulations.

MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

The Administrative Director has determined that the proposed regulations will not impose any new mandated programs on any local agency or school district. The California Supreme Court has determined that an increase in workers' compensation benefit levels does not constitute a new State mandate for the purpose of local mandate claims because the increase does not impose unique requirements on local governments. See County of Los Angeles v. State of California (1987) 43 Cal.3d 46. The potential costs imposed on all public agency employers and payors by these proposed regulations, although not a benefit level increase, are similarly not a new State mandate because the regulations apply to all employers and payors, both public and private, and not uniquely to local governments.

FISCAL IMPACTS

Cost to any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of the Government Code: None. The Spinal Surgery Second Opinion Program itself may, from time to time, impose costs on local agencies and school districts. Any such costs, however, will have been imposed by the Legislature which established this program, and not by these regulations, which merely outline its rules. Any such costs will also be non-discretionary because the requirement that every employer reimburse medical-legal costs for industrially injured employees is a statutory obligation. Furthermore, any such costs are non-reimbursable because the requirement on employers to reimburse medical-legal costs for industrially injured employees is not unique to local agencies or school districts and applies to all employers alike, public and private, including the State of California.

Other nondiscretionary costs/savings imposed upon local agencies: None. To the extent that local agencies and school districts are self-insured employers who must reimburse medical-legal costs for industrially injured employees, they will be subject to the same cost impacts as all other self-insured employers in the state.

Costs or savings to state agencies or costs/savings in federal funding to the State: No impact on any federal funding. The Spinal Surgery Second Opinion program may have cost and savings impacts on State agencies to the extent that the State agencies are employers. These costs will have been imposed by the legislature which adopted the program in SB 228 of 2003, and not by these regulations, which only prescribe some rules for the program. These additional costs, if any, would be the same as for all employers in the state, as they would arise under the obligation for all employers to pay medical-legal costs in workers compensation cases. It is estimated that the program may cost the Department of Industrial Relations as much as \$182,000 annually to operate. However, none of these costs will actually be borne by the State General Fund, as they will be funded entirely by surcharges on employers pursuant to Labor Code section 62.5.